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# Freedom from the Navigation Servitude through Private Investment: *Kaiser Aetna v. United States*, 100 S. Ct. 383 (1979); *Vaughn v. Vermillion Corp.*, 100 S. Ct. 399 (1979)

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Note

# Freedom from the Navigation Servitude through Private Investment

*Kaiser Aetna v. United States, 100 S. Ct. 383 (1979); Vaughn v. Vermillion Corp., 100 S. Ct. 399 (1979).*

## I. INTRODUCTION

By virtue of the commerce clause of the Constitution, the United States Government has regulatory control over the navigable waters of the United States.[1] The power to regulate navigable waters is given to the federal government so that the free flow of interstate commerce over the nation's waterways will be secure.[2] As a corollary of the regulatory power over interstate commerce, the United States Supreme Court decided many years ago that any private property interest obstructing the free flow of navigation over navigable waters is subject to destruction or confiscation by the government without compensation.[3] This burden on property interests came to be known as the federal navigation servitude.[4] Although the navigation servitude has been heavily criticized,[5] the Supreme Court has often, but not consistently,[6] applied it with inequitable results.[7]

In *Kaiser Aetna v. United States*,[8] the Supreme Court found that special circumstances may limit the power of Congress over navigable waters of the United States, so that the no compensation rule of the navigation servitude is of no effect. This note will ex-

1. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). In United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940), navigable waters were defined as those navigable-in-fact or capable of being made navigable-in-fact. For discussion of the tests of navigability, see notes 11-19 & accompanying text *infra*.
2. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).
3. Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1865).
4. *See* United States v. Virginia Elec. & Power Co., 365 U.S. 624, 627 (1961).
5. *See* F. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW 181 (1971).
6. *See* Kaiser Aetna v. United States, 100 S. Ct. 383, 391 (1979).
7. *See, e.g.*, United States v. Rands, 389 U.S. 121 (1967).
8. 100 S. Ct. 383 (1979). Justice Rehnquist wrote the majority opinion. Justice Blackmun, joined by Justices Brennan and Marshall, dissented.

amine the factors, no one of which may have been dispositive,[9] which led the *Kaiser Aetna* Court to refuse to apply the navigation servitude no compensation rule. Factors of particular significance in the decision were the effect of private investment in the improvement of the navigability of the waterway, the waterway's status under state law, and the conduct of the Corps of Engineers in lending approval to the development of the waterway. This note also will briefly examine *Vaughn v. Vermillion Corp.*,[10] which involved canals dug on private land with private funds but connected to navigable waters, and was decided the same day as *Kaiser Aetna*.

### A. Background

*Gibbons v. Ogden*[11] established that the federal government's control over interstate commerce, conferred on Congress by the Constitution,[12] includes control of navigation in the navigable waterways of the United States.[13] Under the English common law navigable waterways are those subject to the ebb and flow of the tide.[14] This test was, and is, adequate for England where most major rivers are subject to the ebb and flow of the tide,[15] but it was too restrictive for conditions in America, where many navigable rivers are not affected by the tides. Therefore, *The Daniel Ball*[16] established the test that navigable waters subject to the control of Congress under the navigation power are those which are navigable-in-fact in their natural state.[17] In *United States v. Appalachian Elec-*

9. *Id.* at 392 n.9.
10. 100 S. Ct. 399 (1979).
11. 22 U.S. (9 Wheat.) 1 (1824).
12. U.S. CONST. art. I, § 8, cl. 3. This clause will be hereinafter referred to as the commerce clause.
13. "America understands and has uniformly understood, the word 'commerce' to comprehend navigation." 22 U.S. (9 Wheat.) at 190.
14. *See* Hardin v. Jordan, 140 U.S. 371 (1891).
15. *See* Shively v. Bowlby, 152 U.S. 1, 32 (1894).
16. 77 U.S. (10 Wall.) 557 (1870).
17. *Id.* at 563. The definition given in *The Daniel Ball* was:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress . . . when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries . . . .

*Id.* The Court had earlier formulated a similar test of navigability to define

*tric Power Co.*,[18] the Supreme Court substantially liberalized the *Daniel Ball* test by holding that waterways capable of being made navigable by reasonable improvements are navigable-in-fact.[19]

The navigation servitude[20] is an expression of the notion that Congress may exercise its navigation power, which exists by virtue

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the scope of admiralty jurisdiction in The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851).

The navigability tests for commerce clause purposes and admiralty jurisdiction have been characterized as being nearly identical. Leighty, *The Source and Scope of Public and Private Rights in Navigable Waters*, 5 LAND & WATER L. REV. 391, 406 (1970). *But see* Adams v. Montana Power Co., 528 F.2d 437 (9th Cir. 1975).

18. 311 U.S. 377 (1940).

19. *Id.* at 407.

> To appraise the evidence of navigability on the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered . . . . A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken. . . . [T]here are obvious limits to such improvements as affecting navigability. There must be a balance between cost and need at a time when the improvement would be useful. When once found to be navigable, a waterway remains so. . . . Nor is it necessary that the improvements should be actually completed or even authorized.

*Id.* at 407-08 (footnotes omitted).

Although the *Appalachian Power* definition of navigability is broad enough to reach practically every stream in the country, Congress has expressly declared that some waterways of the United States shall be deemed not navigable for regulatory purposes. *See* 33 U.S.C. §§ 21 to 59 (1977).

20. "This navigational servitude [is] sometimes referred to as a 'dominant servitude', . . . or as a 'superior navigation easement' . . ." United States v. Virginia Elec. and Power Co., 365 U.S. 624, 627 (1961) (citations omitted). For a critical analysis of the federal navigation servitude, see Morreale, *Federal Power in Western States: The Navigation Power and The Rule of No Compensation*, 3 NAT. RES. J. 1 (1963) (this article is substantially adapted into 2 R. CLARK, WATERS AND WATERS RIGHTS § 101, at 5 (1967)).

Doctrines similar to the federal navigation servitude exist in the laws and jurisprudence of the states, although they may vary in breadth of scope and are always subordinate to the federal navigation servitude. Comment, 4 LAND & WATER L. REV. 521, 521 (1969). The doctrines are described in various ways but usually convey a meaning that certain waters are held by the state for the "public trust". *See* Comment, 75 DICK. L. REV. 256 (1971). Treatment of the state counterparts is beyond the scope of this note, but it should be noted that, since the states are limited in their powers by being required to pay compensation for "takings", *Kaiser Aetna* may affect the scope of the state navigation servitude.

Once navigable water is deemed to be subject to the navigation servitude, it remains so forever, even if it is completely reclaimed. For example, this has created clouds on titles to property in New York City and downtown Boston. Morris, *The Federal Navigation Servitude: Impediment to the Developments of the Waterfront*, 45 ST. JOHNS L. REV. 189 (1970).

of the commerce clause,[21] to take or destroy property rights without compensation in order to secure the public's right to pass over navigable waterways.[22] Under the navigation servitude a person with a property interest in lands between the ordinary highwater marks of a water body holds a mere technical title, no matter what status state law may confer.[23] Damage to these rights is noncompensable because they are considered to have always been subject to or "subordinate to the dominant power of the federal government in respect of navigation."[24] The federal government's interest in securing or maintaining the navigability of a waterway for interstate commerce by exercise of the navigation servitude has been characterized as *proprietory* in nature,[25] as an incidental *power* on Congress' authority to regulate interstate commerce,[26] and as a *right* in the government to occupy submerged lands to improve navigation.[27] Thus, compensation for destruction of private property has been denied when the government destroyed oysters on the submerged bed of a bay,[28] when access to navigable water was cut off,[29] when railroad tracks were permanently sub-

21. The navigation power and the related navigation servitude have their root in the English common law. *See* Shively v. Bowlby, 152 U.S. 1 (1894). *See also* 4 R. CLARK, *supra* note 20, § 305.1, at 98.
22. 4 R. CLARK, *supra* note 20, § 305.3, at 114-15.
23. United States v. Chicago, Mil., St. P., & Pac. R.R., 312 U.S. 592, 596-97 (1941).
24. *Id.* at 596; Scranton v. Wheeler, 179 U.S. 141, 163 (1900).
25. *See* Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 724-25 (1865) (navigable waters of the United States are public property of the nation).

    One commentator has suggested that all of the incidents of the navigation servitude are consistent with an easement or a servitude. Bartke, *The Navigation Servitude and Just Compensation—Struggle for a Doctrine*, 48 OR. L. REV. 1 (1968). This seems reasonable in light of the fact that it is the public's right to pass over navigable waters that is the basis of the navigation servitude.
26. *See* United States v. Twin City Power Co., 350 U.S. 222, 224-25 (1956) (navigation servitude is a dominant power over the flow of a navigable stream which can be asserted against any conflicting one); United States v. Commodore Park, Inc., 324 U.S. 386 (1945) (landowner had title to creek bed under state law, but held just a technical title subject to government's power to control and regulate navigable waters in the interest of commerce).

    The extent of the navigation servitude in the waters of the United States is not coextensive in breadth with the regulatory navigation power derived from the commerce clause, *i.e.*, Congress can regulate a broad range of activities in the aid of navigation, but beyond the bed of a stream, compensation has to be paid for a "taking" of property. *See* 4 R. CLARK, *supra* note 20, § 305.6, at 132.
27. *See* Scranton v. Wheeler, 179 U.S. at 157.
28. Lewis Blue Point Oyster Cult. Co. v. Briggs, 229 U.S. 82 (1913) (government dredged bay and destroyed plaintiff's oysters even though it held as lessee of the owner of the fee of the submerged land).
29. Scranton v. Wheeler, 179 U.S. 141 (1900) (access from shore to navigable part of river permanently obstructed by pier).

merged,[30] when wharves had to be removed,[31] and when a bridge had to be raised.[32]

However, most cases involving the federal navigation servitude have involved questions as to the value of fastland—that is, land bordering on navigable waters but above the ordinary high water mark, taken in condemnation proceedings by the federal government.[33] In 1967, the Supreme Court denied compensation to a landowner for the special value his land along the Columbia River in Oregon had as a port site in *United States v. Rand*.[34] The State of Oregon held an option to buy the land, but the United States condemned and took it for approximately one-fifth of the option price. Thereafter, the United States conveyed the land to the state.[35] The Supreme Court held that the compensable value of the land was limited to its value for sand, gravel and agricultural purposes, since the "Government [may] disregard the value arising from this same fact of riparian location in compensating the owner when fastlands are appropriated."[36]

Carried to its logical extension under the *Appalachian Power* test of navigable waters, the navigation servitude may have been extended to practically any watercourse in the country, as long as the purpose of protection of navigation was expressed.[37] As *Rands* indicates, this result would occur regardless of how much property value was "taken" without compensation.

However, in *Kaiser Aetna*, the Supreme Court declined to extend the navigation servitude to its logical conclusion. The Court held, in effect, that navigable waters of the United States for navigation servitude purposes are not coextensive with navigable wa-

30. United States v. Chicago, Mil., St. P. & Pac. R.R., 312 U.S. 592 (1941) (government's dam raised level of Mississippi River to ordinary high-water mark).
31. Greenleaf Johnson Lumber Co. v. Garrison, 237 U.S. 251 (1915) (government widened navigable channel of river).
32. Union Bridge Co. v. United States, 204 U.S. 364 (1907) (bridge over river found to be unreasonable obstruction to free navigation).
33. Bartke, *supra* note 25, at 10.
34. 389 U.S. 121 (1967).
35. *Id.* at 122.
36. *Id.* at 123-24 (citation omitted). The *Rands* decision, and cases like it, were legislatively overruled in 1970. *See* 33 U.S.C. § 595(a) (1976). For a thorough discussion of the scope of this legislation, see Comment, *Navigation Servitude—The Shifting Rule of No Compensation*, 7 LAND & WATER L. REV. 501 (1972).
37. The *Appalachian Power* test of navigability does not expressly apply to the navigation servitude because *Appalachian Power* involved the application of federal regulatory authority in protecting the navigable capacity of a river. However, the federal interest in protecting the navigable capacity of the river is the same as that inherent in the navigation servitude, so that prior to *Kaiser Aetna* the tests of navigability were considered to be the same for both purposes.

ters of the United States for regulatory purposes under the commerce clause—at least where special *Kaiser Aetna* facts exist.

### B. The Facts of *Kaiser Aetna*

Kuapa Pond is a large fish pond on the island of Oahu, Hawaii. Although contiguous to Maunalua Bay and the Pacific Ocean, in its natural state it was separated from them by a barrier beach, and was not actually navigable-in-fact. Water moved in and out of the pond through the barrier beach from the bay and ocean by action of the tides through sluice gates.[38] Under Hawaiian property law, Kuapa Pond and other fish ponds are considered to be a unique form of real property[39] in that they are treated as the legal equivalent of "fastland."[40]

In 1961 Kaiser Aetna leased 6,000 acres, including Kuapa Pond, from the owner for the purpose of subdivision development around the pond. Kaiser Aetna notified the Corps of Engineers of its plans to dredge and fill parts of Kuapa Pond, erect retaining walls, and build bridges. After the Corps advised Kaiser Aetna that it was not necessary to obtain permits for its development of Kuapa Pond, Kaiser Aetna dredged parts of the pond, increasing its average depth from two to six feet, and built a marina for pleasure boats.[41] Subsequently, the Corps also acquiesced in Kaiser

38. Kaiser Aetna v. United States, 100 S. Ct. 383, 386 (1979).

39. *Id.* at 386.

In ancient times, fishponds were considered the property of tribal chiefs. United States v. Kaiser Aetna, 408 F. Supp. 42, 46 (D. Hawaii 1976), *rev'd*, 584 F.2d 378 (9th Cir. 1978), *rev'd*, 100 S. Ct. 383 (1979). In 1848 the national land distribution known as the Great Mahele was commenced by King Kamehameha III. 408 F. Supp. at 47. Both land and fishponds were distributed together as private property, *id.*, retaining the character they had in ancient times. Brief for Petitioners at 15, Kaiser Aetna v. United States, 100 S. Ct. 383 (1979). Thereafter certain of the so-called sea fisheries appurtenant to the distributed land tracts were opened up to the people for fishing, but fish ponds remained at the disposal of the grantees in the Great Mahele. *Id.* at 16. Later, Hawaiian courts consistently treated fish ponds as private property, and as part of the land. *See* Harris v. Carter, 6 Hawaii 195, 197 (1877).

Congress may have implicitly recognized the unqiue treatment of fish ponds under Hawaiian law in the Hawaiian Organic Act, ch. 339, § 95, 31 Stat. 160 (1900):

> That all laws of the Republic of Hawaii which confer exclusive fishing rights upon any person or persons are hereby repealed, and all fisheries in the sea waters of the Territory of Hawaii not included in any fish pond or artificial enclosure shall be free to all citizens of the United States . . . .

*Id.* The Supreme Court also has determined that unique Hawaiian property rights are entitled to recognition. Damon v. Territory of Hawaii, 194 U.S. 154 (1904).

40. Brief for Petitioners at 26.

41. 100 S. Ct. at 386.

Aetna's plans to dredge an eight-foot deep channel between the pond an Maunalua Bay, which would allow boats to enter and leave the pond. Since part of the channel dredging was to occur in the bay, a permit for this work was obtained from the Corps.[42]

At this time, over 20,000 persons lived around Kuapa Pond, including 1,500 waterfront lessees. These lessees, along with eighty-six non-waterfront lessees and fifty-six nonresident boat owners, paid an annual fee of $72.00 for pond maintenance and security.[43] Considering Kuapa Pond a private recreation haven for those paying the fee, Kaiser Aetna never allowed commercial boating in the pond, and controlled access to the marina.[44]

In 1972, the Corps of Engineers asserted that Kaiser Aetna was required to obtain permits for future dredging, filling, or construction in the marina,[45] and that Kaiser Aetna could not deny the public free access to the pond since it had become navigable water of the United States through Kaiser Aetna's improvements.[46] Kaiser Aetna disputed the Corps' assertions, and, in response, the United States filed suit in the Federal District Court of Hawaii.[47] The district court held that Kuapa Pond was navigable for the purpose of defining the scope of Congress' regulatory power, but that the gov-

42. Brief for Petitioners at 7. A permit was required under section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403 (1976):

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any part, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any part, roadstead, haven, harbor, canal, lake, harbor or refuge, or enclosure within the limits of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

43. Brief for Petitioners at 7. Arguably, the monetary interests at stake in *Kaiser Aetna* may not have been as great as the Court implied, or as large as some at stake in previous cases like *Rands*. Also, tangible property was not actually subject to destruction as it was in *Greenleaf Johnson Lumber* and *Lewis Blue Point*. It appears that the 1500 waterfront lessees' covenants to pay the maintenance fee were not affected by the *Kaiser Aetna* decision. Brief for Petitioners at 7. Nevertheless, it might be argued that free public access to Kuapa Pond may have decreased the value of waterfront property, and decreased the value of the pond itself as a private haven of recreation.
44. Brief for Petitioners at 8.
45. *See* note 42 *supra*.
46. Kaiser Aetna v. United States, 100 S. Ct. at 387.
47. Brief for Petitioners at 8-9.

ernment could not open up the pond to free public access without compensation since the pond was not navigable for the purpose of the federal navigation servitude.[48]

The Court of Appeals for the Ninth Circuit agreed that the pond was under the regulatory authority of Congress, but reversed the district court and held that while the pond was not subject to the navigation servitude, the federal regulatory authority under the commerce clause and the public right of access could not be consistently separated.[49] Thus, exercise of the navigation servitude to assure public access to Kuapa Pond was not a "taking" requiring just compensation.

## II. THE *KAISER AETNA* DECISION

On appeal to the Supreme Court, Kaiser Aetna did not dispute the lower courts' findings that Kuapa Pond was subject to regulatory jurisdiction. Instead, it maintained that the pond was not subject to free public access. The Government contended that the only issue for decision was whether the Kuapa Pond was navigable water of the United States.[50] If the pond was navigable water, the public had a right of navigation over the waters through the federal navigation servitude, despite the fact that the pond was made navigable by private investment.

The Supreme Court conceded that Kuapa Pond was navigable within definitions of navigability given in prior decisions of the Court,[51] but reasoned that those definitions were not used for the purpose of defining the scope of the servitude.[52] The Court indicated that referring to the navigability of a particular waterway is useful only when referring to the purpose for which navigability is invoked, and that none of the prior definitions had been used for the purpose of creating "a blanket exception to the Takings Clause [of the fifth amendment] whenever Congress exercises its commerce clause authority to promote navigation."[53] Thus, Congress,

48. United States v. Kaiser Aetna, 408 F. Supp. 42 (D. Hawaii 1976), *rev'd*, 584 F.2d 378 (9th Cir. 1978), *rev'd*, 100 S. Ct. 383 (1979).
49. United States v. Kaiser Aetna, 584 F.2d 378 (9th Cir. 1978), *rev'd* 100 S. Ct. 383 (1979).
50. Kaiser Aetna v. United States, 100 S. Ct. at 387.
51. *Id.* at 388.
52. *Id.* The far-reaching definition of navigability articulated in United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940), was supposedly used only for the purpose of defining the scope of Congress' regulatory authority under the commerce clause. The definition of navigable waters adopted in The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851), as those waters navigable-in-fact, supposedly is authoritative only for admiralty jurisdiction.
53. 100 S. Ct. at 389.

through the Corps of Engineers, could exercise its authority under the commerce clause to regulate in aid of navigation, including assuring the public a right of access to Kuapa Pond, but whether such regulation went so far as to amount to a taking of property was another question.

In light of Congress' expansive power under the commerce clause, Kaiser Aetna recognized that after *Appalachian Power*, "reference to the navigability of a waterway adds little anything to the breadth of Congress' regulatory power over interstate commerce."[54] Apparently, the Court has cast aside the touchstone of navigability. Not only is navigability no longer necessary to attach regulatory jurisdiction, but the commerce clause power over navigation is now placed in the category of governmental powers that require a balancing of factors to determine if a "taking" has occurred. This allowed the Court to place little weight on navigability concepts when analyzing whether compensation is warranted in a given case. However, navigability is still important in certain cases to determine if a waterway is subject to the navigation servitude.[55]

Once the Court determined that navigability was not important for commerce clause purposes, reference to Kuapa Pond's status under state law as the legal equivalent of fastland was appropriate. Its status prior to development, rather than its navigability after private investment, was the important issue. Therefore, its state law status as fastland remained when the government wished to invade Kaiser Aetna's pond to secure an easement for public navigation. The Court held that under the fifth amendment, the taking of fastland required compensation.[56]

In reaching the extraordinary conclusion in *Kaiser Aetna* that the federal navigation servitude did not attach, the Supreme Court emphasized the facts that prior to its improvement, Kuapa Pond was incapable of use as a navigable highway; it was separated from the bay and ocean by a barrier beach; and it was always considered private property under Hawaiian law.[57]

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54. *Id.*

55. The Court stated that Kuapa Pond was "not the sort of 'great navigable stream' that this Court has previously recognized as being '[in]capable of private ownership.'" *Id.* at 392 (citations omitted). Thus, navigability may be invoked to subject certain waters to the navigation servitude, most probably those that have always constituted navigable highways rather than those made navigable by private investment.

56. The Court held that an invasion of an easement was a compensable taking. *Id.* at 393. *See* Portsmouth Co. v. United States, 260 U.S. 327 (1922).

57. *See* note 39 *supra*. As fastland, Kuapa Pond would be deemed to be above the ordinary high-water mark. Ordinarily, its riparian value could not be considered, United States v. Rands, 389 U.S., 121 (1967), but it is uncertain after *Kaiser Aetna* what the measure of damages should be. The right to exclude

The Court also indicated that the Corps of Engineers might have validly conditioned its approval of Kaiser Aetna's dredge and fill operations on a right of free public access. However, its acquiescence in allowing the pond to be dredged and connected to the bay "estopped" it from later imposing that condition,[58] especially after Kaiser Aetna had invested large sums of money to make Kuapa Pond suitable as a private haven for pleasure boating.

## III. ANALYSIS OF *KAISER AETNA*

*Kaiser Aetna* does not change the scope of Congress' power over the navigable waters of the United States, but it may signal the beginning of judicial abrogation of the no compensation rule of the federal navigation servitude. On the other hand, nothing in the opinion expressly indicates that the federal navigation servitude is inappropriate in all cases. Rather, the result of *Kaiser Aetna* in favor of private property indicates judicial disfavor with the navigation servitude, at least where peculiar circumstances similar to those in *Kaiser Aetna* makes it application particularly inequitable.

### A. The Federal Navigability Concept

The Supreme Court's assertion that waters may be navigable for certain purposes but not for others does not withstand scrutiny when prior decisions are examined. Even though navigability may be the touchstone of several federal powers, it does not follow that different tests of navigability have evolved to delimit the extent of those powers. The Court's analysis of the meaning of navigability lends new uncertainty to the scope of the federal navigability concept, particularly in its application to the navigation servitude.

#### *1. The Ebb and Flow Test of Navigability*

The Government contended in *Kaiser Aetna* that Kuapa Pond was navigable water of the United States in its natural state since it was subject to the ebb and flow of the tides.[59] The Court, however, seemed to reject this test of navigability[60] since the Court's

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others is arguably equal in value to the annual tolls collected from nonresidents, and the value of the tolls collected from non-residents of the Kaiser Aetna development is dependent on accessibility to and from the bay. This value probably would not be compensable under previous cases. *See, e.g.*, Scranton v. Wheeler, 179 U.S. 141 (1900).

58. Although the court in *Kaiser Aetna* asserted that the government could not be estopped, 100 S. Ct. at 392, its decision on this point was based on an estoppel analysis. *See* § III-C of text *infra*.

59. 100 S. Ct. at 393-94 (Blackmun, J., dissenting).

60. *Id.* at 394.

opinion does not recognize it as the basis for federal jurisdiction of any kind, and expressly rejected it as an appropriate basis for invoking the navigation servitude.[61]

The ebb and flow test of navigability is derived from the common law of England where its use was, and is, warranted by the fact that most rivers navigable-in-fact are affected by the tides.[62] Although the early cases of *The Propeller Genesse Chief v. Fitzhugh*[63] and *The Daniel Ball*[64] recognized that this test was too restrictive for conditions in America, some courts have recently determined that the ebb and flow test was not rejected by those cases; instead, a more expansive test was adopted for nontidal areas.[65] In *Zabel v. Tabb*,[66] the ebb and flow test was used as the basis for federal jurisdiction. In that case, the Corps of Engineers, applying its definition of navigable waters,[67] asserted jurisdiction over tidelands which were not navigable-in-fact, but which were subject to the ebb and flow of the tides. The Corps denied a permit for landfill because of the adverse effects it would have on the environment. The court upheld the denial of the permit partly on the ground that the land was subject to the federal navigation servitude and, thus, there was not a taking of plaintiff's property.[68]

*Kaiser Aetna* leaves in doubt the continuing validity of the ebb and flow test of navigability as the basis for assertions of federal jurisdiction by federal agencies in cases like *Zabel*. It may still be used for asserting regulatory jurisdiction under the commerce clause, or for extending admiralty jurisdiction, but it may be unavailable for applying the navigation servitude, at least where private interests have succeeded in making a waterway navigable-in-fact. This conclusion is difficult to square with the traditional notion that private interests located in waterways subject to the navi-

61. 100 S. Ct. at 392 n.10.
62. The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).
63. 53 U.S. (12 How.) 443 (1851).
64. 77 U.S. (10 Wall.) 557 (1870).
65. *See, e.g.*, United States v. Stoeco Homes, Inc., 498 F.2d 597 (3d Cir. 1974); United States v. Cannon, 363 F. Supp. 1045 (D. Del. 1973). *Cf.* Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971) (waters subject to ebb and flow of tide treated as navigable waters for Corps of Engineers dredging jurisdiction).
66. 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).
67. Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the water-body, and is not extinguished by later actions or events which impede or destroy navigable capacity.
33 C.F.R. § 329.4 (1979).
68. 430 F.2d at 215.

gation servitude have always been burdened with the paramount right of the public to free access regardless of how much private investment was involved. Thus, if Kuapa Pond was subject to the navigation servitude prior to Kaiser Aetna's development, it is difficult to understand why it would lose its servitude because of such investment. The answer probably lies in the fact that Kaiser Aetna greatly enhanced Kuapa Pond's navigability. In the future private investors may be able to claim that their "investment" in a navigable stream increased it navigability potential, thus warranting compensation if taken by the government because the public's right of navigation has benefited.

### 2. *The Navigable-in-Fact Test of Navigability*

After improvements by Kaiser Aetna, Kuapa Pond was navigable under the *Daniel Ball* test of navigability-in-fact, or was at least susceptible to being made navigable-in-fact under the *Appalachian Power* test. However, the Court in *Kaiser Aetna* held that even if the pond was subject to the Corps of Engineers regulatory power, it was not subject to a public right of access unless compensation was paid.[69] In essence, this means that it was navigable for purposes of regulatory jurisdiction under the commerce clause, but was not navigable for purposes of the navigation servitude, even though the servitude is also derived from the commerce clause. The Court emphasized the fact that Kuapa Pond was made navigable-in-fact only through private investment efforts.

The tests of navigability articulated by the Court have arisen in different contexts involving different federal powers.[70] However, prior to *Kaiser Aetna*, the courts have not limited the applications of the tests to the context in which they arose.[71] Furthermore, even though the tests may have evolved in different contexts, those that have evolved appear to be identical.[72] Thus, the Court's attempt in *Kaiser Aetna* to limit the applicability of tests for deter-

69. 100 S. Ct. at 389.

70. *See* note 52 *supra.*

71. Kaiser Aetna v. United States, 100 S. Ct. at 395 (Blackmun, J., dissenting); MacGrady, *The Navigability Concept In the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*, 3 FLA. ST. U. L. REV. 511, 587 n.401 (1975). MacGrady argues that the Court has demonstrated confusion in the past by not recognizing that different federal tests of navigability have evolved for different purposes. *Id.*

Another commentator indicates that although differing tests of navigability may exist for different purposes, one test exists for determining the scope of federal authority under powers given Congress by the Constitution. *See* Leighty, *supra* note 17, at 397-98.

72. *See* Leighty, *supra* note 17, at 406.

mining the navigable waters of the United States to particular contexts is somewhat confusing.

Even if different tests of navigability exist for determining the scope of the federal government's admiralty jurisdiction and its commerce clause jurisdiction, the test formulated for delimiting the scope of the latter should be the applicable test of navigability for navigation servitude purposes. Although the servitude may be narrower in scope and function than the navigation power derived from the commerce clause, it is merely a corollary of the Congressional navigation power which secures the right of the public to unobstructed passage over the navigable waters of the United States, however they may be defined. This leads to the conclusion that the navigation servitude extends to all navigable waters of the United States, as defined for commerce clause purposes in the *Daniel Ball*,[73] and as expanded in *Appalachian Power*.[74]

The *Kaiser Aetna* Court concluded, however, that this position ignores the historical roots of the federal navigation servitude. The servitude evolved when interstate commerce included only transportation, and transportation was usually accomplished by travel on navigable waters. At that time the navigation power and the navigation servitude were co-extensive. Presently, however, the commerce clause is broader in scope than when it was used to merely confer authority on Congress to regulate transportation.

### *3. The Vitality of the Navigability Concept*

*Kaiser Aetna* recognized that Congress' authority to regulate commerce on the waters of the United States does not depend on a stream's navigability,[75] and is not limited to purposes of aiding navigation. The Court in *Kaiser Aetna* characterized the expansive definition of navigable waters formulated in *Appalachian Power*[76] as an attempt to reach practically every waterway in the nation so as to make the navigation power commensurate with the

73. *See id.*

74. *See* note 19 *supra*. The dissent in *Kaiser Aetna* essentially adopted the position that the navigation servitude applies to all navigable waters of the United States as defined for commerce clause purposes. 100 S. Ct. at 395 (Blackmun, J., dissenting).

75. 100 S. Ct. at 389-90. Since the Supreme Court's expansion of the scope of the commerce clause in Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941); and NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), it has been recognized that activities that may "affect" interstate commerce are subject to Congress' authority. Interstate commerce, therefore, is not limited to transportation of goods on the navigable waters of the United States, as it may have been at the time Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) was decided.

76. 311 U.S. 377 (1940).

general commerce clause power.[77] In other words, when *Appalachian Power* was decided, the Court still felt that navigability had to be the touchstone of federal power,[78] even though it implicitly recognized that navigability was not important for attachment of the commerce clause jurisdiction.

The Court in *Kaiser Aetna* concluded that if the *Appalachian Power* test of navigability was used for navigation servitude purposes, it would create an inequitable exception to the takings clause of the fifth amendment, which was not the intent of *Appalachian Power*. *Kaiser Aetna* requires a fifth amendment "taking" analysis, rather than a mere formalistic determination of whether a waterway is navigable, to determine if compensation is required.

*Kaiser Aetna* indicates that after *Appalachian Power* the federal navigability concept has little vitality with respect to conferring regulatory authority on Congress under the commerce clause. Navigability may be useful only for conferring authority on Congress to effectuate purposes other than mere federal regulation of waters "in aid" of interstate commerce. These purposes may include the protection of the environment through the Corps of Engineers,[79] securing the public's right of access to navigable waters suitable as highways of commerce, or creating recreational aquatic parks like Kuapa Pond. However, the *Kaiser Aetna* Court concluded that the expansive federal definitions of navigability could not be used to effectuate these purposes by taking property without compensation under the navigation servitude. Therefore, a more limited test of navigability for navigation servitude purposes is appropriate, but *Kaiser Aetna* gives little or no indication of what such a test might be.[80]

Nevertheless, if the unique factual circumstances presented the Court in *Kaiser Aetna* had not existed, the *Appalachian Power* definition of navigability may have been appropriate to bring Kuapa Pond within the navigable waters of the United States for federal navigation servitude purposes. The Court's refusal in *Kaiser Aetna* to subject Kuapa Pond, even though navigable-in-fact, to the navigation servitude indicates that references to navigability of a stream for this purpose is not useful without an analysis of how the stream achieved its present status. In *Kaiser Aetna*, Kuapa

77. *See* 100 S. Ct. at 389-90.

78. The present federal test of navigability under *Appalachian Power* for commerce clause purposes has been characterized as "a standard without exception and, therefore, one with little meaning." Hoyer, *Corps of Engineers Dredge and Fill Jurisdiction: Buttressing A Citadel Under Siege*, 26 U. FLA. L. REV. 19, 23 (1973).

79. *See* Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

80. For some considerations that may be appropriate for determining navigability for navigation servitude purposes, see 100 S. Ct. at 392-93.

Pond's status depended, in part, on the fact that enormous sums of money had been invested to make what was always considered a private pond under state law into a navigable recreational park.

### B. State Law Status of a Waterway

Throughout its opinion in *Kaiser Aetna*, the Court placed particular emphasis on the status of Kuapa Pond under Hawaiian property law. Although its status as the legal equivalent of fastland may have been useful in arguing that Kaiser Aetna had no notice of impending assertion of the federal navigation servitude,[81] the Court indicated that its state law status as private property, in itself, may have limited federal authority over the pond.

Relationships between the state and private individuals have not received much weight in previous navigation servitude cases. In *Lewis Blue Point Oyster Cultivation Co. v. Briggs*,[82] compensation was denied for destruction of oysters planted on land submerged under the Great South Bay of the State of New York. The plaintiff claimed to hold the land as lessee of the owner of the fee in the bed of the bay. The plaintiff contended that compensation had to be paid when title to such an area came from the state and was invaded by the federal government in dredging operations to aid navigation. The Court held that the private owner had only a qualified title.[83] The dominant federal right of navigation included the right to use the bed of water for every purpose which is in aid of navigation.[84] Whatever rights the state had over navigable waters within their boundaries before the Union was formed had been delegated to Congress by the Constitution.[85]

*Lewis Blue Point* is not unlike *Kaiser Aetna* in that the lessees in both cases held the submerged land under rights recognized by state law. However, in *Lewis Blue Point* the bay had always been navigable water, and could be said to have been clearly subject to the dominant federal right of navigation. The pond in *Kaiser Aetna*, on the other hand, had clearly become navigable water of the United States only after extraordinary private investment. The dominant federal right of navigation attached, if at all, only after this investment made the pond navigable.

81. *See* note 91 & accompanying text *infra*. Its state law status as private fastland may only have been a convenient avenue for finding that compensation had to be paid in this case for opening the pond to public access, since the government has always had an obligation to condemn fastlands. *See* notes 25 & 57 *supra*.
82. 229 U.S. 82 (1913).
83. *Id.* at 87.
84. *Id.*
85. *Id.* at 87-88.

In *Greenleaf Johnson Lumber Co. v. Garrison*,[86] the plaintiff, who held title to the soil which formed the bed of a river, was required to remove his wharf from shallow water without compensation when Congress decided to widen the navigable channel of the river. The Court quoted with approval language from *Philadelphia Co. v. Stimson*[87] to the effect that the power of Congress "could not be fettered by any grant made by the State of the soil which formed the bed of the river, or by any authority conferred by the State for the creation of obstructions to its navigation."[88]

*Greenleaf Johnson Lumber*, *Lewis Blue Point*, and other cases[89] indicate that private property rights held under state law are of no consequence when the government seeks to secure the unobstructed passage of the public on navigable waters. However, these cases involved navigable waters to which it could properly be said that the navigation servitude had always attached. *Kaiser Aetna* indicates that state law status cannot be defeated when waters were not navigable prior to private development. The private property interest conferred by a state cannot be destroyed merely because private development creates navigable water of the United States.

The *Kaiser Aetna* Court emphasized that, prior to its improvement, Kuapa Pond was the legal equivalent of fastlands under state law. Perhaps this emphasis can best be explained as an unwillingness to extend the frequently inequitable rule of no compensation to include water bodies which were incapable of navigation prior to private development. The pond's state law status was not a delimitation of federal power; it was another way to bring the navigation power within the traditional fifth amendment "taking" analysis which is required when Congress exercises most of its other powers.[90]

Prior to the development of Kuapa Pond, Kaiser Aetna had no notice that the pond was subject to a federal dominant right of navigation because it was not readily susceptible to navigational uses. Therefore, Kaiser Aetna's expectancies were that it could develop the pond and use it as a private haven, as any other landowner

86. 237 U.S. 251 (1915).
87. 223 U.S. 605 (1912).
88. 237 U.S. at 261-62.
89. *See, e.g.*, United States v. Chicago, Mil, St. P. & Pac. R.R. 312 U.S. 592 (1941) (rail company "owned" land between high water marks and low water mark—title was subordinate to dominant power of government in respect of navigation); Scranton v. Wheeler, 179 U.S. 141 (1900) (title in submerged lands is a qualified one held subordinate to public right of navigation).
90. The federal government has other powers which may be utilized at the expense of private property, for example, the taking of water rights under the so-called reservation doctrine. *See* Comment, *supra* note 36, at 502 n.5.

may expect to be able to use his land, subject only to being taken and paid for in the exercise of some governmental power.[91] However, because Kaiser Aetna sought approval for its operations in Kuapa Pond from the Corps of Engineers prior to any commencement of dredging and filling operations, Kaiser Aetna had notice that the pond was subject to the Corps' jurisdiction. Therefore, recognizing Kuapa Pond's status as fastland under state law due to a lack of notice of any dominant federal right therein is not entirely satisfactory. Nevertheless, the Corps' acquiescence, at that time and later, in Kaiser Aetna's operations may have led to the government being "estopped" from denying the pond's status as fastland under state law.

### C. Estoppel of the Government

The Court in *Kaiser Aetna* stated that "the consent of individual officials representing the United States cannot 'estop' the United States."[92] Yet its analysis of the Corps of Engineers conduct in consenting to dredging operations of Kaiser Aetna seems to be based on estoppel-type reasoning. The Court stated that the Corps' consent could "lead to the fruition of a number of expectancies embodied in the concept of 'property' "[93] which the government must condemn and pay for.

Before *Kaiser Aetna* similar conduct on the part of the government usually did not estop it from exercising its power without compensation under the navigation servitude. For example, *Union Bridge Co. v. United States*[94] involved a bridge which was an obstruction to the free navigation of the Allegheny River. Even though the bridge had been built under authority from the State of Pennsylvania and without objection from the United States, Union

91. The Court characterized these expectancies as being an element of property. 100 S. Ct. at 393.

92. *Id.* at 392. The historical rule of no estoppel against the government is an offshoot of sovereign immunity; both have been widely criticized. *See* Berger, *Estoppel Against the Government*, 21 U. CHI. L. REV. 680, 680-81 (1954). There can be no estoppel of the government when public rights are at stake because a government official should not be able to give away public interests when the law does not permit it. United States v. California, 332 U.S. 19, 39-40 (1947) (government was not barred from enforcing rights to lands underlying ocean even though its agencies may have been negligent in asserting claims at an earlier date).

Arguably, in *Kaiser Aetna* the Corps of Engineers was not prohibited from unconditionally allowing dredging in Kuapa Pond, but whether it could thereby forfeit any public right of free access which may have existed is another question.

93. 100 S. Ct. at 393. The district court considered, but summarily dismissed, the claim that the Corps' conduct estopped the government.

94. 204 U.S. 364 (1907).

Bridge was fined for refusing to make the necessary alterations. The Court held that failure on the part of the government to act when the bridge was built could not prevent Congress from later determining that the bridge had become an unreasonable obstruction to navigation.[95]

In *Greenleaf Johnson Lumber Co. v. Garrison*[96] the plaintiff had been allowed to build a wharf out to the navigable channel of a river, which was the harbor line[97] as previously established by the Secretary of War. Congress subsequently decided to reestablish the harbor line closer to shore in order to widen the navigable channel of the river. The plaintiff was required to remove its wharf without compensation.[98]

Despite the fact that the bridge at issue in *Union Bridge* and the wharf in *Greenleaf Johnson Lumber* had been lawfully built, both were obstructions to navigation and were abated without compensation to the owners. These situations are similar to *Kaiser Aetna* in that the toll required by Kaiser Aetna for passage into Kuapa Pond was an obstruction to the free flow of navigation. However, neither *Union Bridge* nor *Greenleaf Johnson Lumber* involved the unique circumstances emphasized in *Kaiser Aetna*, where the waterway's navigability had been brought about by the private investor who created the obstruction. *Kaiser Aetna* indicated that private investment gave the investor the right to charge a toll if the government failed to reserve a right to free public access.

Petitioner Kaiser Aetna placed particular emphasis[99] on *Monongahela Navigation Co. v. United States*,[100] in which a private company had constructed locks and dams in the river to improve its navigability,[101] and had charged tolls for passage. Thereafter, the government, not wishing to award compensation for the value of the tolls, attempted to condemn one lock and dam for substantially less than it was worth. The Court found the government had to pay full value since the lock and dam had been constructed at

95. *Id.* at 400.
96. 237 U.S. 251 (1915).
97. Section 11 of the Rivers and Harbors Act of 1899, now codified as 33 U.S.C. § 404 (1976), gives the Secretary of the Army authority to establish harbor lines for the purpose of artifically separating navigable channels and harbor areas from areas not essential to navigation. Hoyer, *supra* note 78, at 24. Once such lines were established, permits were required for any private construction outside such lines, but were not required for construction on the shoreward side of the line. *See id.*
98. 237 U.S. at 264.
99. *See* Brief for Petitioners at 55-57.
100. 148 U.S. 312 (1893).
101. The construction had been undertaken as a condition to the building of locks and dams on the river by the government. *Id.* at 324.

the suggestion and implied invitation of Congress. The Court held that it did not lie in the power of Congress to say that the lock and dam were obstructions to navigation or were wrongfully in the river.[102]

In *Kaiser Aetna* and *Monongahela* improvement in the navigability of the watercourse in question was accomplished through the efforts of private investors. Monongahela is distinguishable because the government had taken an active role in encouraging the development, whereas in *Kaiser Aetna* it only had acquiesced in it. This distinction is of only minor significance, however, in that both courses of conduct had the effect of bringing about navigability by private efforts. After *Kaiser Aetna*, the Corps of Engineers should be able to avoid estoppel by conditioning its acquiescence in private improvements to waterways on a right of free public access to the developed waterway once it is made navigable.[103]

## IV. THE *VAUGHN* DECISION

*Vaughn v. Vermillion Corp.*,[104] decided the same day as *Kaiser Aetna*, involved canals dug on private land by private investors. The canals were connected with the Gulf of Mexico and the Intercoastal Waterway. The petitioners wished to use the canals for commercial fishing and shrimping activities, but the lessee of the land refused to allow these uses. The Court stated that disposition of *Vaughn* was controlled by its decision in *Kaiser Aetna*, but remanded the case for a determination of whether natural navigable waters were diverted or destroyed by connection with the private canals. If natural navigable waters were diverted or destroyed, the public might have a right of access.

In *Vaughn*, the Court expressly stated what was only implied in *Kaiser Aetna*—artificially constructed waterways are not subject to a public right of access. However, the Court's decision did not give any more indication than did *Kaiser Aetna* of whether the navigation servitude is still a vital federal power. *Vaughn* does indicate that a formalistic approach is inappropriate for determining the scope of federal domination in navigable waterways. The open

102. *Id.* at 335. This case was subsequently explained as resting upon an estoppel theory. *See* Greenleaf Johnson Lumber Co. v. Garrison, 237 U.S. 251, 265 (1915); Lewis Blue Point Oyster Cult. Co. v. Briggs, 229 U.S. 82, 89 (1913).

103. This course of conduct on the part of the Corps of Engineers does not appear to be foreclosed by the Court's opinion, even though it was not possible in this case. The Court stated that "the Government . . . could have conditioned its approval of the dredging on petitioner's agreement to comply with various measures that it deemed appropriate for the promotion of navigation." Kaiser Aetna v. United States, 100 S. Ct. at 392. *See id.* at 399 (Blackmun, J., dissenting).

104. 100 S. Ct. 399 (1979).

question of whether natural navigable waters were affected by the canals may indicate that the navigation servitude is not dead for all times.

## V. CONCLUSION

If the ebb and flow test of navigability was rejected in *Kaiser Aetna*, future permit denials by the Corps of Engineers for dredge and fill operations in tidelands may not withstand attack. The Corps would have no authority to deny such permission and the denials therefore would constitute "takings" requiring compensation. However, Congress could probably delegate regulatory authority to the Corps under more traditional "effects on interstate commerce" analysis which would be a sufficient basis for denying permits.

The effective reach of the federal navigation servitude is left in doubt after *Kaiser Aetna*, since it determined, in effect, that the servitude was not coextensive with the navigable waters of the United States for commerce clause purposes. *Kaiser Aetna* may signal the beginning of the end of the much criticized[105] federal navigation servitude,[106] but it is more likely that *Kaiser Aetna* represents a peculiar factual situation in which compensation was appropriate. Kaiser Aetna expended much effort to make Kuapa Pond suitable for navigation and it would have been unfair to allow access to everyone while Kaiser Aetna bore the entire cost. Kaiser Aetna is a "helper", *i.e.*, one who has enable the public to realize a public right;[107] to these persons the no compensation rule seems particularly inequitable. On the other hand, in return for making Kuapa Pond navigable and opening it up to the bay, Kaiser Aetna received benefit by being allowed access to open, navigable water. The balance of the benefits received by Kaiser Aetna against the costs incurred indicates that the opening of Kuapa Pond to public access without compensation to Kaiser Aetna may also have been appropriate.

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105. *See* F. TRELEASE, *supra* note 5, at 181.

106. Congress may award compensation, irrespective of whether it has to, in all cases where the federal navigation servitude may otherwise exist by an expression in a given act that it is exercising a power other than the navigation power. *See* United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950) (government could not deny compensation when it had treated a dam project as one involving reclamation rather than navigation). Congress has also provided that compensation of full values of fastland should be awarded in the *Rands* class of cases. *See* notes 34-36 & accompanying text *supra*.

107. F. TRELEASE, *supra* note 5, at 184.